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No. 82-1051

In the Supreme Court of the United States

OCTOBER TERM, 1982

PAUL BENDETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND ON MOTION FOR LEAVE TO SUPPLEMENT THE PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in rejecting a plea agreement proffered by petitioner and the government.

In the supplement to the petition for a writ of certiorari, which petitioner moved on February 4, 1983 for leave to file, petitioner would enlarge the questions presented to include the following additional question:

2. Whether the district court improperly deprived petitioner, who was represented by separate counsel at trial, of a right to counsel of his own choosing by limiting the participation by another attorney on behalf of petitioner and his two co-defendants.

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OPINION BELOW

The judgment order of the court of appeals affirming petitioner's conviction (82-894 Pet. App. 1a-2a) is not reported.[1] The judgment order of the court of appeals on petitioner's pretrial appeal concerning joint representation (Supp. Pet. App. 16a) also is not

[1] Two co-defendants who were convicted along with petitioner, Dennis Mastro and Peter DeLamos, filed a separate petition for a writ of certiorari with this Court. *Mastro* v. *United States*, No. 82-894, cert. denied (Jan. 10, 1983). The judgment order of the court of apeals affirming the conviction of these three defendants is not included in petitioner's appendix but rather appears in the appendix in No. 82-894.

reported.[2] The opinion of the district court on the joint representation issue is reported at 498 F. Supp. 450.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1982. A petition for rehearing was denied on October 22, 1982. The petition for a writ of certiorari was filed on December 21, 1982, and on February 4, 1983, petitioner moved for leave to supplement his petition to enlarge the questions presented in the original petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to travel interstate and to use the telephone to promote a racketeering enterprise, in violation of 18 U.S.C. 1952 and 2314 (Count 1); conspiring to engage in a pattern of racketeering activity, in violation of 18 U.S.C. 1962 (c) (Count 2); and eleven counts of interstate travel and use of the telephone in aid of racketeering, in violation of 18 U.S.C. 1952 and 2 (Counts 3-10 and 12-14).[3] The court of appeals affirmed by judgment order (82-894 Pet. App. 1a-2a).

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[2] "Supp. Pet." refers to a supplement to the petition for a writ of certiorari, which petitioner moved to file on February 4, 1983.

[3] Petitioner's co-defendants, Mastro and DeLamos, were also convicted of conspiring to violate 18 U.S.C. 1962(c) and on eleven counts of violating 18 U.S.C. 1952. Two other co-defendants, Ruggerio Boiardo and Philip Leone, were severed prior to trial. The district court acquitted a sixth defendant, James Vito Montemarano, of all charges at the close of the government's case (Tr. 1286). At the close of all the evi-

Petitioner was sentenced to concurrent terms of three years' imprisonment and fined $25,000 on Counts 1 and 2. He was sentenced to a concurrent three-year term and fined $10,000 on Count 3. The district court suspended sentence on the remaining counts and imposed a five-year term of probation to run consecutively to petitioner's sentence on Counts 1, 2 and 3 (82-1051 Pet. 3-4). The court of appeals affirmed (82-894 Pet. App. 1a-2a).

The evidence at trial showed that petitioner and co-defendants Dennis Mastro and Peter DeLamos owned and operated a Las Vegas casino in partnership with Anthony and John Russo and Ruggerio Boiardo (Tr. 297, 437, 545, 598-599). The Russo brothers and Boiardo had prior criminal records, and under Nevada law they could not be licensed to operate a casino (Tr. 148-149, 151, 157, 850, 1297, 1484, 1512-1516).[4] Petitioner owned 24% of the casino and oversaw its daily operations (Tr. 71-75; Gov. Exh. G551). Petitioner and his co-defendants concealed from state authorities the illegal ownership by Boiardo and the Russos (Tr. 414-415, 431, 448, 715-716, 930, 932, 989-990). These three "organized crime figures" helped petitioner and his co-defendants obtain loans (Tr. 481-482, 489-490, 517-518, 519-520, 541, 1779), obtain building permits without complying with local ordinances (Tr. 272, 541-542, 590-592, 618, 621-622, 915-918, 940-945), protect the casino from rival criminal groups (Tr. 273-274, 313,

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dence, the court also acquitted petitioner, Mastro, and DeLamos on two counts of interstate transportation of money obtained by fraud (Counts 11 and 15) (Tr. 2268).

[4] Anthony and John Russo were unindicted co-conspirators. Both were deceased by the time of the indictment.

318-319, 495-496, 688, 694, 741), use the casino to place bets on outside sporting events (Tr. 456-458, 465, 603), control employee theft (Tr. 442-443, 611, 730-731), and collect gambling debts owed to the casino (Tr. 301, 349-351, 712-713, 845-846, 1767). In return, petitioner and his co-defendants shared the profits from the casino with the Russo brothers and Boiardo (Tr. 267, 290, 292, 294, 354-358, 363, 377, 385-387, 390-391, 393, 555, 565, 628, 659, 647-648, 700, 934-936, 1707-1708).

ARGUMENT

1. Petitioner contends (82-1051 Pet. 6-14) that the district court abused its discretion in rejecting a proffered plea agreement he negotiated with the prosecutor pursuant to Fed. R. Crim. P. 11(e)(1)(C). That provision of Rule 11 permits the government and the defense to enter into discussions with a view toward reaching an agreement under which the government agrees that a specific sentence is the appropriate disposition of the case.

The agreement involved in this case provided that petitioner and Mastro would plead guilty to one count of violating 18 U.S.C. 1952 and would receive a sentence of five years' probatio nand a fine of $10,000. In return, the government agreed to dismiss the remaining counts against petitioner at the time of sentencing. DeLamos agreed to plead guilty to a complaint filed by the State of Nevada charging him with violating the Nevada Gaming Control Regulations; in return, the government agreed to move to dismiss the federal indictment against him upon his sentencing in state court. In addition, petitioner and his two co-defendants agreed to execute a consent judgment in a civil RICO action under 18 U.S.C. 1964(e)

that would render them jointly and severally liable to divest themselves of $170,000 in profits and enjoin them from engaging in any casino gambling activities (82-1051 Pet. App. 7a-8a). The district court rejected the plea agreement (82-1051 Pet. App. 8a-11a), and petitioner was then tried and convicted.

Petitioner asserts that the district judge rejected the proposed plea agreement because, as a matter of policy, he would not accept any agreements pursuant to Fed. R. Crim. P. 11(e)(1)(C), which provides that the attorney for the government may agree that "a specific sentence is the appropriate disposition of the case." Petitioner contends that the district court may not reject a plea agreement on this basis. Contrary to petitioner's contention, however, Rule 11(e)(2) broadly provides that "the court may accept or reject the agreement" under Rule 11(e)(1)(C), without qualification as to the grounds for rejection. The advisory committee note on the 1974 amendments to Rule 11(e) emphasizes the district court's discretion in this regard, stating that "[t]he plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge."

Moreover, the legislative history of Congress's consideration of the 1974 amendments to Rule 11 makes clear that a district court indeed may refuse to accept proffered plea agreements. In describing the amendments to Rule 11, the House Committee Report states:

> The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning

> the disposition of the case. The procedure is not mandatory; *a court is free not to permit the parties to present plea agreements to it.*

H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 6 (1975) (emphasis added). The report continues (*ibid.*):

> Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements.

In a footnote, the Committee added (*id.* at 6 n.7a):

> Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it.

In support of his contention that a district court cannot systematically reject Rule 11(e)(1)(C) plea agreements presented to it, petitioner relies (82-1051 Pet. 7) exclusively on *United States* v. *Ammidown*, 497 F.2d 615 (D.C. Cir. 1973). In *Ammidown*, however, the plea agreement provided for the defendant, who had been charged with first degree murder, to plead guilty to second degree murder, and the first degree murder charge was then to be dismissed. The agreement did not provide for the prosecutor to recommend less than the maximum sentence of life imprisonment, under which the defendant, who was 49

years old, would not be eligible for parole for 15 years. Under the agreement in *Ammidown*, the defendant also was to testify before a grand jury and at trial against his accomplice, a much younger man who the government believed was involved in another murder. 497 F.2d at 618, 622-623. The district court refused to approve the agreement and accept the plea, despite the importance of the arrangement to the government, because it concluded that the public interest would not be served by a conviction of only second degree murder. The court of appeals reversed. It observed that whether a charge should be dismissed upon a determination that conviction of a lesser offense would adequately protect the public is a matter almost entirely within the discretion of the prosecutor and that the court should only rarely condemn the prosecutor's agreement in this regard. 487 F.2d at 620-622.

Thus, in *Ammidown* it could be said that the district court was entering into the domain of the prosecutor in determining what charges should be brought or pursued. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869). The government did not agree in *Ammidown* even to make a recommendation concerning a sentence less than the maximum for second degree murder; that case therefore did not impact upon the court's discretion to impose a sentence within the range established by law. By contrast, in a plea agreement under Rule 11(e)(1)(C), such as that involved here, the government and the defendant do agree that a particular sentence is the appropriate disposition of the case. Such an agreement therefore directly implicates the sentencing decision, which even the court in *Ammidown* recognized as within the discretion of the trial court. 497 F.2d at 619, 621.

There is, accordingly, less reason to believe that Congress would have intended to circumscribe the court's discretion as to such agreements. The instant case is therefore quite different from *Ammidown*.

Furthermore, as petitioner concedes (82-1051 Pet. 7), the District of Columbia Circuit in *Ammidown* was construing a prior version of Rule 11, which did not even contain any provision comparable to the present Rule 11(e)(1)(C). Since then, Congress has amended Rule 11, and as we have shown, the legislative history of those amendments clearly establishes that a district judge has discretion under the new Rule to refuse to accept a plea agreement of the type at issue here.

Petitioner acknowledges the legislative history discussed above, but he nevertheless argues (82-1051 Pet. 9) that this history is not as clear as its explicit terms indicate. He does not rely on anything in the legislative history itself in support of the supposed ambiguity that would limit the courts' discretion with respect to Rule 11(e)(1)(C) agreements. Rather he argues that *Ammidown* was "a controversial and well-publicized ruling by a distinguished federal judge," yet, he continues, neither the advisory committee notes nor the House Committee Report states that the amended rule was intended to repudiate *Ammidown*. From this, petitioner argues that the decision in *Ammidown* must still be accepted as valid law and that it renders the district court's action here invalid. This argument is without merit. As we have shown, the instant case is quite different from *Ammidown*, because the agreement here provided for a particular sentence. Even assuming that Congress intended to preserve the core principle of *Ammidown* that requires judicial deference where the interests of the prosecution, not the court, are primarily im-

plicated, that principle would not govern here. Although the advisory committee notes and congressional committee reports do not mention *Ammidown*, they do emphasize that the district court may decline to accept a plea agreement—thereby indicating at the very least that the holding in *Ammidown* should not be *extended* to Rule 11(e)(1)(C) agreements under the new rule.[5]

2. Petitioner sets forth at the beginning of his petition two additional questions presented (82-1051 Pet. i, Questions 2 & 3) that his co-defendants raised in

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[5] Moreover, as petitioner acknowledges (82-1051 Pet. 9-11), the Fifth and Eighth Circuits have expressed the view that the legislative history of Rule 11(e) diminishes the precedential effect of *Ammidown*. See *United States* v. *Bean*, 564 F.2d 700, 703 n.4 (5th Cir. 1977); *United States* v. *Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981). Petitioner argues (82-1051 Pet. 11), however, that the First Circuit in *United States* v. *Escobar Noble*, 653 F.2d 34 (1st Cir. 1981), recently recognized "the continued validity of *Ammidown*." But in *Escobar Noble* the court simply cited but did not follow *Ammidown*. Instead, the First Circuit acknowledged that a trial court has "wide latitude" to reject a plea agreement and upheld the district court's rejection of the particular agreement in that case. In addition, the court in *Escobar Noble* distinguished *Ammidown* on grounds that are equally applicable here, stating (653 F.2d at 36):

> This is not a case where acceptance of the plea agreement is both reasonable and necessary to secure a legitimate and important prosecutorial interest. See *United States* v. *Ammidown* * * * (plea bargain enabled prosecutor to obtain critical testimony needed to convict an accomplice, and without seriously weakening sanctions that would be imposed on defendant).

Thus, there is no conflict between the First Circuit's decision in *Escobar Noble* and the decision below.

the petition in No. 82-894.[6] Petitioner does not adduce any argument in support of those claims or even advance them as independent reasons for granting his petition; he simply states in the conclusion to the petition (82-1051 Pet. 14) that the Court should grant his petition if it grants the petition in No. 82-894 on these two questions. Since the Court has already denied the petition for a writ of certiorari in No. 82-894, there is no occasion to grant the instant petition as to those issues.

3. a. On February 4, 1983, petitioner filed a motion for leave to supplement the petition for a writ of certiorari to raise an additional issue not presented in the certiorari petition itself: whether the trial court impermissibly denied him counsel of his choice at trial by not permitting one attorney, Oscar Goodman, to represent petitioner and his co-defendants. Petitioner's motion for leave to supplement his certiorari petition should be denied. The question petitioner seeks to present in the supplement was previously raised in a petition for a writ of certiorari to review

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[6] The government waived its right to file a response in No. 82-894.

In Question 2, petitioner claims that the district court violated his Sixth Amendment right to confront witnesses against him by admitting evidence of tape recorded conversations between the defendants and three co-conspirators who did not testify at trial. (Two of the witnesses, the Russo brothers, were dead at the time of trial, and another witness, Boiardo, had been indicted along with petitioner, but his trial was severed because he was physically unable to stand trial (2/11/80 Tr. 5)). In Question 3, petitioner claims that he was deprived of a fair trial and due process by the erroneous admission of the tape recorded conversations. (The defendants contended at trial that their tape recorded statements were made involuntarily).

the court of appeals' rejection of this same claim on an interlocutory appeal, and the Court denied the petition on that occasion. 452 U.S. 938 (1981). As petitioner concedes (Motion vii), he did not again present this issue to the court of appeals on appeal from the judgment of conviction.[7] Moreover, because the precise issue he now seeks to raise had been raised at an earlier stage of the proceedings, petitioner cannot claim to have overlooked it at the time he filed his second certiorari petition.

Petitioner asserts (Motion vi) that the Court's granting of the petition for a writ of certiorari in *Flanagan* v. *United States*, No. 82-374 (Jan. 10, 1983), warrants permitting him to supplement his certiorari petition. However, the petition in *Flanagan* was filed on September 1, 1982, long before the instant petition was filed on December 21, 1982. Moreover, on November 26, 1982—almost a month before petitioner filed his certiorari petition—the United States filed a response to the petition in *Flanagan* acquiescing in certiorari because of the conflict between the Third Circuit's decision in that case (rendered on June 2, 1982) and the Second Circuit's decision in *United States* v. *Curcio*, 680 F.2d 881

[7] After the Court denied the petition for a writ of certiorari in 1981, the case proceeded to trial, at which petitioner and his co-defendants were represented by separate counsel. Soon after proceedings recommenced in the district court, that court held a hearing to resolve outstanding questions regarding the conduct of the trial. At this hearing, counsel for co-defendant Mastro indicated that Goodman was no longer representing the defendants and that trial counsel had for several reasons, including the potential conflict of interest, recommended to his client that Goodman discontinue his representation of the defendants (7/7/81 Tr. 5). Goodman did not participate in any further proceedings.

(2d Cir. 1982) (rendered on May 26, 1982), as well as the prior decisions in *United States* v. *Agosto*, 675 F.2d 965 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982), and *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Petitioner therefore had ample opportunity to take *Flanagan* and the circuit conflict into account when he filed his certiorari petition. Accordingly, the motion to supplement should be denied.

b. In any event, for the reasons stated more fully in our brief in opposition to the previous petition raising this issue (80-1615 Br. in Opp.), certiorari clearly is not warranted on the counsel-of-choice issue. Contrary to petitioner's contention (Supp. Pet. 8), this case is quite different from *Flanagan*, and accordingly it would not be affected even if this Court were to reverse the Third Circuit's decision in *Flanagan*. In *Flanagan*, the district court found that the defendants had knowingly and intelligently waived any Sixth Amendment rights arising out of a potential conflict of interest in their joint representation. In contrast, as we explained in the previous brief in opposition (80-1615 Br. in Opp. 7-11), this case simply does not raise the question whether a trial court may order the disqualification of an attorney because of conflicts of interest where the defendants knowingly and intelligently waive their rights. As petitioner concedes (Supp. Pet. 7), the district court in this case stated that it could *not* find that petitioner and his co-defendants had knowingly and intelligently waived their rights to conflict-free representation (Supp. Pet. App. 12a)—and conflicts were conceded to exist by their joint counsel, Oscar Goodman, in October and November 1979, long before trial, at

which time Goodman further conceded that petitioner and his co-defendants would require separate counsel by the time of trial (80-1615 Br. in Opp. 2-4; 10/10/79 Tr. 19-20, 35; 11/5/79 Tr. 13, 17).[8] It could not seriously be contended that the district court was required to permit joint representation by Goodman in the absence of such a waiver.

Petitioner suggests (Supp. Pet. 7-9) that the district court was wrong and that there was in fact a knowing and intelligent waiver in this case. But peti-

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[8] The issue at the October and November 1979 hearings was whether Goodman would be permitted to remain in the case prior to trial to assist separate counsel with matters relating to Nevada gambling laws. At the October hearing, Goodman stated (9/10/79 Tr. 20):

> It would be my intention, your Honor, that if this Court would permit me to remain in the case that at the time of trial each of the defendants would be represented by separate counsel.

Somewhat later in the hearing Goodman added (*id.* at 28):

> I would respectfully suggest to the court that with these gentlemen having independent counsel at the time of trial that certainly they would be entitled to no less at this point in time to have a Nevada attorney who is familiar with Nevada rules and regulations and laws go through the pretrial matters.

At the November hearing he said (11/5/79 Tr. 13):

> I have discussed with the three defendants, Mr. Bendetti, DeLamos and Mastro, that it's going to be necessary to have independent counsel representing their interests at the time of the trial. However, at the same time because of the cost factors and the considerations as to the unusual nature of the indictment involving Nevada, they continue to ask me to remain as their counsel for purposes of at least litigating the electronic surveillance in the case.

tioner points to no place in the record at which petitioner waived his Sixth Amendment right to conflict-free representation. Petitioner's argument is instead based (see Supp. Pet. 8-9) solely on inferences of a knowing and intelligent waiver he would draw from the district court's exploration of the dangers and risks of joint representation [9] and the fact that each

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[9] The discussion at the October 1, 1979 hearing relied upon by petitioner (Supp. Pet. 3, 8) necessarily referred only to Goodman's role *prior* to trial (Supp. Pet. App. 1a), because Goodman already had conceded that separate counsel would be necessary at the trial itself. See pages 5, 12-13 and note 8 *supra*. Because Goodman did not seek to appear in the case after this Court denied certiorari, it is not clear to what extent he would have been permitted to participate under the district court's order or that he was prepared to assume an active role in the case.

At the July 29, 1980 hearing, co-defendant DeLamos' new counsel asserted that Goodman, who was not present at the hearing, was prepared to execute an affidavit stating that he then perceived no conflict in representing all three defendants at trial (7/29/80 Tr. 17). Goodman, however, neither filed such an affidavit nor otherwise personally disavowed his previous acknowledgements that he could not appropriately represent all three defendants at trial. Moreover, attorney Vernon, counsel for co-defendant DeLamos, noted at the July hearing that the defendants had acceded to and did not at that time question the propriety of the requirement that they have individual counsel at trial along with Goodman (7/29/80 Tr. 18). Later, Vernon indicated that DeLamos might want Vernon to withdraw completely, in favor of Goodman (*id.* at 24, 28, 32, 35), but subsequently he stated that the defendants were not seeking to give up the benefits of separate counsel (*id.* at 39). No similar suggestion of a possible desire for joint representation exclusively by Goodman was made on behalf of petitioner. Under these circumstances, the district court clearly was correct in determining that the defendants had not adequately waived their right to effective, conflict-free counsel at trial.

defendant was represented by separate counsel after it was clear that Goodman would not represent them at trial. The latter factor, petitioner appears to argue, suggests that petitioner and the others were adequately advised about their rights in connection with the joint representation. Such inferences obviously are insufficient to satisfy the waiver standards of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), upon which petitioner relies (Supp. Pet. 8), and are even more inadequate as a basis for attacking the district court's explicit finding that petitioner and his co-defendants had *not* made a knowing and intelligent waiver (Supp. Pet. App. 12a). The court of appeals did not disturb this finding when it affirmed the district court's decision on petitioner's first appeal (*id.* at 16a), and that court had no occasion to revisit the issue on the second appeal because petitioner did not renew the issue. Nor does petitioner suggest that he was prejudiced by not being represented by Goodman. Especially in these circumstances, and in the absence of an adequate record to further illuminate the waiver question, there is no occasion for this Court to review the question of waiver.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to supplement the petition should be denied.

Respectfully submitted.

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